

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
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)

IMPLEMENTATION OF THE PAY)
TELEPHONE RECLASSIFICATION AND)
COMPENSATION PROVISIONS OF THE)
TELECOMMUNICATIONS ACT OF 1996)
)

CC Docket No. 96-128
File No. NSD-L-99-34

**REPLY COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to *Public Notice*, DA 99-730 (released April 15, 1999), hereby replies to the comments of the American Public Communications Counsel ("APCC") submitted in response to the Petition for Clarification ("Petition") filed by the RBOC/GTE/SNET Payphone Coalition ("RBOC/GTE/SNET") in the subject docket. Although offered in support of the RBOC/GTE/SNET Petition, the APCC comments actually confirm TRA's view that the Petition is fatally flawed.

In opposing the RBOC/GTE/SNET Petition, TRA demonstrated that the Petition should be denied as procedurally infirm and without substantive public policy merit. As TRA showed, the Petition, although styled a request for clarification, improperly sought reconsideration of a decision issued by the Commission in CC Docket No. 96-128 more than two years ago. Accordingly, TRA continued, RBOC/GTE/SNET was inviting the Commission to commit reversible procedural error in urging it to implement what RBOC/GTE/SNET had earlier acknowledged was a "suggested

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revision" to its payphone compensation rules and policies without benefit of notice and comment rulemaking proceedings.¹

TRA further demonstrated that from a public policy point of view, the action sought by RBOC/GTE/SNET was neither warranted nor advisable. As TRA explained, Congress directed the Commission to eliminate, not create, barriers to participation by small businesses in telecommunications. And, TRA continued, RBOC/GTE/SNET's unsupported allegations of "serious shortfall[s] in payments of per-call compensation"² certainly did not justify imposition of dramatic new costs on small carriers in direct contravention of this clear Congressional mandate.³ Indeed, TRA emphasized, given that small CIC-based switchless resale carriers do not have the ability to track call origination, they would be unable to comply with the suggested new requirement if their underlying network service providers declined to perform this function on their behalf, and would, in such circumstance, have no choice but to abandon their use of carrier identification codes ("CICs").

¹ Letter from Michael K. Kellogg, counsel to the RBOC/GTE/SNET Payphone Coalition, to Lawrence Strickling, Chief, Common Carrier Bureau, Federal Communications Commission, dated November 17, 1998, at page 6.

² Petition at 1.

³ As recognized by the Commission, "[b]ecause they do not have their own networks, it would be significantly more burdensome for resellers to track calls from payphones." Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order, 11 FCC Rcd. 20541, ¶ 86, Order on Reconsideration, 11 FCC Rcd. 21233 (1996), *vacated in part sub nom. Illinois Public Telecomm. Ass'n v. FCC*, 117 F.3d 555, 560, *clarified on rehearing* 123 F.3d 693 (D.C. Cir. 1997), Second Report and Order, 13 FCC Rcd 1778 (1997), *remanded in part MCI Telecommunications Corp. v. FCC*, 143 F3d 606 (D.C. Cir. 1998), Third Report and Order and Order on Reconsideration of the Second Report and Order, FCC 99-7 (released Feb. 4, 1999), *petition for review pending American Public Communications Council v. FCC*, Case No. 99-1114 (filed March 22, 1999).

Moreover, TRA pointed out, not only had the Commission twice rejected such self-serving, conclusory claims of compensation shortfalls by payphone service providers ('PSPs"),⁴ but the magnitude of the claimed shortfall -- *i.e.*, "from 20 to more than 50 percent less than the amount that Coalition members expected, based on their own records"⁵ -- and its purported cause -- *i.e.*, the failure of switch-based resale carriers to track and compensate PSPs for payphone-originated subscriber toll free and access code calls -- defied credibility. As TRA explained, neither the shortfall, nor any significant percentage thereof, could be attributable to resale carriers, much less the subset of resale carriers with switches, because resale carriers do not occupy 20 percent, much less 50 percent or more, of the interexchange market.

Accordingly, TRA strongly urged the Commission not to burden with call tracking and direct payment obligations CIC-based switchless resale carriers which have been dutifully compensating PSPs through their underlying network service providers simply to assist RBOC/GTE/SNET and other PSPs with a relatively straightforward collection effort. The Courts and the Commission's formal complaint processes, TRA stressed, were available for this purpose.

APCC adds little to the RBOC/GTE/SNET Petition other than to offer additional exaggerated claims and hyperbole. Hence, APCC's claims serve only to further undermine those of RBOC/GTE/SNET, the credibility of which, as noted above, is already tenuous.

⁴ Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Second Report and Order, 13 FCC Rcd 1778 at ¶ 56 (1997); Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Third Report and Order and Order on Reconsideration of the Second Report and Order, FCC 99-7 at ¶ 162.

⁵ Petition at 2.

For example, APCC claims that PSPs' ability to "collect *only about a portion* of the estimated compensation owed them, largely because of the problem raised by the LEC Coalition's petition," has resulted in "[c]ollection shortfalls . . . of such a magnitude as to threaten the stability of the payphone industry."⁶ APCC attempts to substantiate this facially exaggerated claim with selected anecdotal "evidence." To this end, APCC refers to "an IXC" which allegedly "'took back' from APCC's clearinghouse clients more than 25% of the compensation initially paid for the fourth quarter of 1997, because it determined that millions of calls handled by its network were delivered to switch-based resellers."⁷ As noted above, however, the entire universe of resale carriers, inclusive of switch-based, partially switch-based and "switchless" resale providers, do not account for 25 percent of the market. In fact, AT&T Corp. ("AT&T"), MCI WorldCom, Inc. ("MCI WorldCom") and Sprint Corporation ("Sprint"), alone, hold a collective market share of 80 percent, with substantial facilities-based providers such as Frontier Corporation ("Frontier"), Cable and Wireless USA ("Cable & Wireless"), Qwest Communications Corporation ("Qwest"), and Excel Telecommunications, Inc. ("Excel") occupying a significant percentage of the remaining 20 percent.⁸

Undaunted, APCC cites a letter submitted to the Commission by Sprint for the proposition that "Sprint apparently determined that about 20 % of its payphone-originated traffic was routed to switch-based resellers."⁹ What Sprint actually said was that *with respect to the traffic*

⁶ APCC Comments at 3 (emphasis added).

⁷ Id. at 5.

⁸ Zolnierek, J., Rangos, K., Eisner, J., Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, Long Distance Market Shares Fourth Quarter 1998, Table 3.1 (March 31, 1999).

⁹ APCC Comments at 5.

generated by a single PSP's facilities, "it appeared that 20 of the 25 percentage points related to traffic from switch-based resellers."¹⁰ Moreover, Sprint made this representation in the context of a passage questioning the validity of the RBOC/GTE/SNET claim that "the amount of compensation received from some of the major interexchange carriers has been from 20 to more than 50 percent less than the amount that coalition members expected based on their own records."¹¹ As described by Sprint, it "has had very little complaint from the members of the Coalition regarding the level of compensation paid by Sprint," noting that "Sprint has been contacted by just two members of the Coalition regarding possible compensation shortfalls," one of which is referenced above, the other of which "made a vague expression of disappointment with the amount of compensation."¹²

APCC also asserts that it purportedly "invoiced some 1,200 companies that it identified as carriers," complaining that "[m]ost of the carriers that responded claimed they were not required to pay compensation to PSPs."¹³ Roughly 50 percent of resale carriers are "switchless" and, therefore, compensate PSPs indirectly through their underlying network service providers.¹⁴ The large bulk of the remaining carriers are only partially switch-based and, accordingly, also compensate PSPs indirectly for some (usually significant) portion of their traffic through their

¹⁰ Letter to Lawrence E. Strickling, Chief, Common Carrier Bureau, Federal Communications Commission, from Richard Juhnke, Sprint, p. 1, dated December 4, 1998.

¹¹ Id. at 2.

¹² Id.

¹³ APCC Comments at 5.

¹⁴ Telecommunications Resellers Association, 1998 Reseller Membership Survey and Statistics, 1 (July 1998).

underlying network service providers. And network service providers have been extremely diligent in collecting payphone compensation surcharges from their "switchless" resale carrier customers.

What this all boils down to is that whatever collection problem there may be likely is far smaller than RBOC/GTE/SNET or APCC suggest, and that the problem does not justify imposing on switchless CIC-based resale carriers a burden the Commission has repeatedly found cannot be justified. The Commission had it right in the past when it declined to sanction unsupported shortfall claims by PSPs, noting on one occasion that it could not determine "the percentage of uncollected per-call compensation that is due to billing errors of the PSPs, as opposed to unscrupulous carriers."¹⁵ APCC has identified the appropriate manner of dealing with carriers that do not pay lawful charges, advising that it has "filed lawsuits against seven resellers."¹⁶

One further assertion by APCC requires a response. APCC asserts that "the carriers' implementation of the current rules on per-call compensation *do* 'impose inordinate burdens' on PSPs seeking payments."¹⁷ Implicit in this contention is the view that additional burdens should be thrust upon interexchange carriers ("IXCs"). Collectively, IXCs, including small switch-based resale carriers, have been required to spend tens of millions of dollars to comply with the Commission's call tracking and direct payment obligations.¹⁸ Debit card providers have been denied any

¹⁵ Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Third Report and Order and Order on Reconsideration of the Second Report and Order, FCC 99-7 at ¶ 162.

¹⁶ APCC Comments at 5.

¹⁷ Id. (emphasis in original).

¹⁸ Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order, 11 FCC Rcd. 20541 at ¶ 86 ("Cable & Wireless estimates that it would require a \$1 million investment to establish a tracking mechanism for all of the calls that its network carriers.").

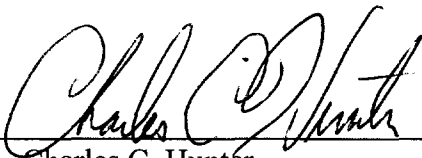
meaningful opportunity to recover substantial amounts paid to PSPs as a result of granted waivers requiring them to pay per-call compensation even in the absence of the delivery of the payphone-specific coding digits necessary to permit such recovery. Now RBOC/GTE/SNET and APCC want to increase these burdens to simplify their collection efforts. The Commission should decline, honoring the Congressional mandate to foster, not impede, participation by small entities in the telecommunications industry.¹⁹ As TRA noted in its comments, it makes no sense to penalize carriers which have complied with their statutory obligations in a ham-handed effort to strike at those who have not, particularly when the extent of the non-compliance is unknown.

¹⁹ As TRA pointed out in its comments, the Commission has expressly rejected proposed changes to its payphone compensation regime on the grounds that they would “contradict congressional directives set forth in other sections of the Act.” Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Third Report and Order and Order on Reconsideration of the Second Report and Order, 13 FCC Rcd 1778 at ¶ 42.

By reason of the foregoing and the arguments set forth in its earlier-filed comments, the Telecommunications Resellers Association once again strongly urge the Commission to deny as procedurally defective, or, in the alternative, as unsound from a public policy perspective, the RBOC/GTE/SNET Petition.

Respectfully submitted,

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June 1, 1999

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CERTIFICATE OF SERVICE

I, Nina Kearse, do hereby certify that a true and correct copy of the foregoing document has been hand-delivered to or served by the United States First Class Mail, postage prepaid, on the attached list of individuals and entities, on this 1st day of June, 1999.


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